BRIEF IN SUPPORT OF THE PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion by Bluett, J. speaking for Common Pleas Court No. 4 of the County of Philadelphia is not reported. It appears in the record submitted herewith (p. 13a *et seq.*).

The Supreme Court of Pennsylvania affirmed it by a divided vote. The majority opinion by Drew, J., reported in 346 Pa. 624, 31 A. (2d) 289, 291, will be found in the record at pages 25a *et seq.* The minority opinion by Maxey, C. J., reported in 346 Pa. 640, 31 A. (2d) 298, will be found in the record at pages 44a *et seq.*

THE STATUTES INVOLVED.

This cause involves Pennsylvania Public Law 45 of 1932 (The Sterling Act); the Philadelphia Income Tax Ordinance of Dec. 13, 1939, and U. S. Public Act No. 819 (4 U. S. C. Sec. 14 *et seq.*), the pertinent provisions of all of which enactments are set forth in an appendix hereto.

JURISDICTION.

Jurisdiction is invoked pursuant to Section 344 of Title 28 U. S. C., and as more particularly set forth in the foregoing petition.

STATEMENT OF THE CASE.

The Summary Statement in the foregoing petition contains all material facts.

The points of law to be considered are as therein set forth in the "Reasons Relied on for Allowance of the Writ," and will be here developed *seriatim*.

ARGUMENT.

(a) At the time of the passage of the Tax Ordinance the Naval Reservation at League Island was part of the United States, enjoyed no protection from the City, and hence was not subject to the Ordinance.

This proposition was recognized by the majority as well as the minority opinion in the Pennsylvania Supreme Court and therefore need not be further developed. It had been also the point of decision in *Manlove v. McDermott*, 104 Super. Ct. 560, pp. 562, 563; in *Burke v. Aspromet*, 4 Workmen's Compensation Supplement 2566, p. 905, and in *Haggerty v. O'Brien Bros.*, 21 Luzerne 7, all of which held that the Navy Yard lay outside the geographical limits of Philadelphia.

The City wage tax ordinance itself, by Sec. 10, forbade its application "to any person or property as to whom or which it is beyond the legal power of Council to impose the tax * * *". The power of Council was derived from the Sterling Act, which expressly limited the delegated power to tax as one exercisable only "within the limits of such

city" (1932, P. L. 45). And back of this Act was the State Constitution (Art. IX, Sec. 1) prescribing that "all taxes shall be * * * within the territorial limits of the authority levying the tax."

Consistent with the want of any power to tax property upon, or earnings of nonresidents of Philadelphia employed on, League Island, the City of Philadelphia has never attempted to provide any of its municipal facilities for use in that area, nor to afford any benefit or protection to those resident or working there as such residents or workers. (p. 3a). League Island is a self-contained community, wholly independent of both state and city (except for the reserved right of the state's writs to run therein).

(b) The subsequent passage of the U. S. Public Act 819 did not touch the Naval Reservation, since the words "Federal area" as used in the Act did not embrace lands previously ceded to the United States.

The effective enactment is found in Sec. 2 (a) of Act 819:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; * * *"

It will be noted that the phrases "any state" and "any duly constituted taxing authority" (here the City of Philadelphia) are modified by the phrase immediately following them: "having jurisdiction to levy such a tax,". Without radical alteration of the sentence structure as well as of the

natural and usual meaning of the latter phrase, it is difficult to deny to it the effect of limiting the right to tax employees in a Federal area to those municipalities already possessing such right, or "jurisdiction".

The majority opinion below objects to this plain meaning of the words of the Act on the ground that it would "nullify this legislation". The court therefore assigns to the phrase "jurisdiction to levy such a tax" the quite different significance of "jurisdiction to levy *this type of tax*". Of the construction urged by plaintiff it says:

> "Such a construction is the equivalent of saying that Congress merely intended to authorize states to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation. Cf. *Superior Bath Co. v. McCarroll*, 312 U. S. 176, 178. The phrase in question is obviously descriptive of the language preceding it and refers to the *power* of the taxing authority to impose the type of tax mentioned; it does not refer to its jurisdiction over the territory." (pp. 41a, 42a).

The fallacy in this statement by the lower Court is exhibited by the remaining language of Section 2, which unmistakably uses "jurisdiction" to embrace territorial limitation. It declares:

> ": and *such* State or *taxing authority* shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." (Italics supplied.)

By "*such . . . taxing authority*" the Congress clearly meant a city with limited territorial jurisdiction, for the "full

jurisdiction and power" given to levy and collect taxes "in any Federal area within such state" could not be exercised by a municipality except in a Federal area lying within the bounds of such City. Philadelphia, for instance, could not enforce its wage tax against employees in a Federal area in Pittsburgh, although this would be the literal effect of the criterion suggested by the Court below, namely, jurisdiction "to impose the type of tax mentioned." Unless we read the phrase "such taxing authority" both with reference to the preceding portion of the section, and as embracing a territorial limitation upon the power to tax, the absurd result would follow that any municipality with power to impose a wage tax could tax persons in any Federal area "within such state." We must therefore, in assigning a reasonable intention to the Congress, give to the limiting phrase "having jurisdiction to levy such a tax" its full and natural significance of embracing any and all limitations, whether those having regard to territory, or those regarding such other restraints as may have surrounded the taxing power at the time Act 819 was adopted.

The majority opinion apparently recoils from a construction of the Act which would make it merely declaratory. But this is no ground for condemning it. Declaratory acts are no novelty. All of our uniform state laws are declaratory; and the usual function of a Code is to declare the law. The historic reason and need for declaring by this Act the law as it had been recently developed in *Graves v. New York, ex. rel. O'Keefe,* 306 U. S. 466, and kindred decisions, —as well as its relation to the Public Salary Tax Act (5 U. S. C. Sec. 84a)—are clearly stated in Chief Justice Maxey's dissenting opinion, at pages 49a to 54a of the record. The State Superior Court in *Phila. v. Schaller,* 148 Pa. Super. Ct. 276, had previously said, with reference to Act 819:

> "It is not necessary to refer to the reason for this act. For our purpose we need only observe that it is no more than declarative of the existing law as established by *Graves v. People of State of New York ex rel. O'Keefe.*"

Even if the declaratory construction insisted on below and here were "absurd" (which it is not), still courts cannot by decision supply a meaning which the words of the Act manifestly do not contain. As the late Mr. Justice Holmes said for this Court:

> "If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective."
>
> *U. S. v. Plowman*, 216 U. S. 372, 375.

But there is further evidence in the Act that it was not intended to apply to lands *ceded* to the United States. "Federal area" is therein defined (Sec. 6-c) as "any lands or premises *held or acquired* by or for the use of the United States or any department, establishment or agency of the United States." (Italics ours.) What is significant in this definition is the omission of any reference to lands held by the United States as the result of cession of sovereignty. The words "held or acquired" are appropriate only to lands conveyed or leased or which have been taken by condemnation proceedings. There is no suggestion of any purpose on the part of Congress to make its enactment applicable to the distinctive class of lands sovereignty over which has been ceded to the United States.

(c) Under no valid construction of Public Act 819 may the United States be held to have ceded the sovereign power of taxation theretofore vested in it back to the ceding State or directly to the City.

In view of the admitted premise that the City had no power prior to Act 819 to tax nonresidents on League Island, it is obvious that if such a power is now to be recognized, the Act must be construed as ceding to the City the sovereign power of taxation heretofore vested solely in the United States. Indeed, assumption must go the length of recognizing that Act 819 extended the geographical bounds of Philadelphia to include League Island, as only in this way could the City obtain jurisdiction over those who work therein but reside in other states. To this length the court below was driven, but did not plainly so declare.

It did declare this to be a case of *retrocession to the State* of the taxing powers previously ceded by it to the Federal government (p. 31a), but since it is not the State but the City (i. e. "a duly constituted taxing authority therein") that is claiming to exercise a power derived directly from Congressional grant, the majority opinion has not met the issue. There are no words appropriate either to cession or retrocession to be found in the Act. The phrase "having jurisdiction to levy such a tax" must have been addressed to a preexisting jurisdiction, not to one bestowed by the Act itself. We look in vain throughout the Act for evidence of intention by Congress to cede its taxing powers to this municipality—evidence which, lacking in the Federal Act, cannot, as the majority opinion suggests, be supplied by the report of a sub-committee of Congress. *U. S. v. Mo. Pacific Rwy. Co.*, 278 U. S. 269, 277, 278; *Marchese v. U. S.* (5th Cir., 1942), 126 F. (2d) 671, 674; *Comm. Internal Rev-*

enue v. Rabenold, (2nd Cir., 1940), 108 F. (2d) 639, 641.

So critical a consequence as a surrender of sovereign powers is not a matter for implication, but for express grant. *Erie Rwy. Co. v. Pa.* 21 Wall (88 U. S.) 492, 499; *Nardone v. United States,* 302 U. S. 379, 383; *United States v. Calif.,* 297 U. S. 175, 186.

> "• • • It can hardly be pretended, we think, that the rights of a sovereign state, admitted to the union on an equal footing with the original states in all respects whatever, can be taken away by implication."
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> *Clay v. State,* 4 Kans. 49.

To the same effect is *People v. Godfrey,* 17 Johns. 225. The sovereignty of the union is at least of equal dignity with that of any component State.

A tax statute in derogation of sovereignty must be construed *strictissimi juris. Norfolk & Western Ry. v. Pendleton,* 156 U. S. 667, 673; *U. S. v. Herron,* 87 U. S. 251, 255, 263.

(d) Even if cession had been intended, it was not, and could not, be accepted by the City.

As the majority opinion points out (p. 32a), transfer of sovereignty is a matter of "mutually satisfactory arrangements", citing *Collins v. Yosemite Park Co.,* 304 U. S. 518, 528. An "arrangement" implies a meeting of the minds of the parties; an acceptance as well as an offer. "Acceptance is necessary", *Yellowstone Park etc. Co. v. Gallatin Co.,* 31 F. (2d) 644, 645; cert. den. 280 U. S. 555. So it was held with reference to retrocession by the United States of that portion of the District of Columbia that lay in Virginia. *McLaughlin v. Bank of Potomac,* (Ct. App., Va.) 7 Grat. 68, 70. And see Minority Opinion (pp. 55a, 56a).

If Act 819 may be construed as tendering to the City of Philadelphia a Federal grant of power to levy income taxes within the League Island area, there was certainly no formal acceptance of such a grant. City Council took no action *vis a vis* this supposed offer, and, as we show later, only the legislative branch may accept a grant which carries with it the correlative obligation of service.

The majority opinion in recognition of the necessity of finding an acceptance, declares that one may be presumed "in the absence of a contrary intent" (p. 32a). From this it must follow that in a converse case the burden is to be put upon an allegedly recipient sovereignty of showing that it did not accept the tendered cession. But the obligations of government may not be thus casually imposed. Acceptance of the power to levy taxes in a given area entails the reciprocal obligation of supplying service and protection to those subjected to the tax. *State Tax on Foreign Held Bonds*, 15 Wall. (82 U. S.) 300, 322; *Bristol v. Washington Co.*, 177 U. S. 133, 142; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592; *McKeon et al v. Council Bluffs* (Sup. Ct. Iowa 1928), 221 N. W. 351; *Courtney v. Louisville* (Ct. Apps., Ky. 1876), 12 Bush. 419. It would be a mischievous rule of law that could impose upon a state or municipality this consequence of accepting a grant of taxing power merely because it had not registered its refusal of the proffered grant.

The majority opinion cites *Silas Mason Co. v. Tax Comm.*, 302 U. S. 186, 207-208, as its sole authority for this doctrine of presumed acceptance. But the reliance is on dictum, as Chief Justice Maxey points out in his dissenting opinion (pp. 60a, 61a). Nor is what Mr. Chief Justice Hughes said in the *Mason* case accurately quoted in the majority opinion. He did not say that "acceptance will be presumed", but that "acceptance *may* be presumed in the absence of a contrary

intent." There is no justification for drawing from this general and undocumented expression the formulation of a principle of law which entitles the court below to assert that acceptance of a supposed grant of sovereignty by Public Act 819 will be presumed in the absence of proof of a contrary intent. No authority has been adduced to sustain so broad a proposition; the opinion below amounts to a substitution of "must" for "may" in the dictum cited.

A further and invincible objection to indulging the presumption of acceptance by the City is found in the indisputable fact that the City had no power to accept the grant. The point is not dealt with in the majority opinion. But it can not be overlooked. A municipal corporation has such powers and such only as the State confers upon it. *Mt. Pleasant v. Beckwith,* 100 U. S. 514; *Thompson v. Carroll,* 63 U. S. 422. Under Pennsylvania law the City "is the creature of the legislature and invested with subordinate governmental functions by its charter to be exercised and performed within certain territorial limits." *Elliott v. Monongahela City,* 229 Pa. 618, 79 A. 144, 145. "Local municipalities have none of the elements of sovereignty in them" (*Metropolis Theatre Co. v. Chicago,* 246 Ill. 20, 92 N. E. 597); and taxation is an incident of sovereignty (*Federal etc. Rwy. Co. v. Pittsburgh,* 226 Pa. 419, 75 A. 662), which may be exercised by a municipality only when made the subject of an express grant by the State. *Whelen's Appeal,* 108 Pa. 162, *Leslie v. Kite,* 192 Pa. 268, 43 A. 959.

The power of the City in this case to levy income taxes emanates from a single source—the Sterling Act (Appendix, p. 24.)—by which that power is circumscribed. It may be exercised only "within the limits of such City." See *Marson v. Philadelphia,* 342 Pa. 369, on pages 370 and 373. The City may not transcend those territorial limits and the Federal Congress cannot clothe it with authority to do so.

The City is the offspring of the State, not of the United States. The "limits" of its jurisdiction cannot be extended to embrace League Island by aught except state legislation. *Beaty v. Inlet Beach, Inc.,* (S. C. Fla., 1942), 9 So. 2d 735, 741. To presume that the City of Philadelphia accepted this supposed Federal grant would be to presume that it did what it had no power to do.

But had it the power, the mere fact that the mayor and municipal receiver of taxes have elected to enforce the Philadelphia Wage Tax ordinance against nonresidents working on League Island is not the legal equivalent of legislative acceptance of the supposed grant. The executive branch of the Government has no power to bind its people in such case; only its legislature may do so. *Meriwether v. Garrett,* 102 U. S. 472. Contracts and other dealings between states are accomplished by the acts of their respective legislatures. *Chesapeake, etc. Canal Co. v. Baltimore & Ohio Ruy.* (Ct. App., Md. 1832), 4 Gill & J. 1. Generally speaking,the powers of a state legislature are limited only by what is forbidden it in state and Federal constitutions. *Ware v. Hylton,* 3 Dall. 199, 1 L. Ed. 568. The reason of the general rule applies with equal force to the subsidiary city government where the same division of powers is found.

Acceptance of the obligations of protection that accompany the exercise of the power of taxation is a matter of public policy, determination of which does not fall within the orbit of executive power. It is confined solely to the legislative branch. *Baker v. U. S.,* 27 F. (2d) 863, cert. den. 278 U. S. 656. And if only the state legislature, and not the City Council, could accept a Federal grant of taxing power, even where the "grant" in terms refers to "any . . . duly constituted taxing authority" within such state, then where is the basis for a presumed acceptance by the city?

The anomaly of Congress making a direct grant of taxing

power to a state municipal corporation is a basic answer to the City's contention that Act 819 was intended as an act of cession, or that it was other than a declaratory act adopted in the interest of protecting existing taxing powers in the several states and their municipalities.

(e) Even if acceptance could be presumed, the new power of taxation thus supposedly ceded or granted to the City would have had to be exercised by adoption of a new ordinance. The Federal Act could not of itself extend the scope and force of the pre-existing tax ordinance.

Admittedly the wage tax ordinance of December 1939 did not give the City of Philadelphia the power to tax Federal employees in the situation of the plaintiff. If this ordinance, which was unenforceable against plaintiff in 1940-1941, may now be enforced against him, it is not by reason of any new legal doctrine declared by the Courts, but solely by reason of a new Federal statute. We know of no authority for according to such a statute the power to extend the scope of an existing municipal ordinance. "A power never possessed cannot expand." *Federal etc. Rwy. Co. v. Pittsburgh*, 226 Pa. 419, 75 A. 662, 664.

If advantage is to be taken of new powers supposedly made available to the municipality by federal statute, it must be done through subsequent legislative action, first by the State, then by the municipality. We must here avoid confusing two clearly distinguishable means of amending the law: restatement by decision, and restatement by statutory amendment. The court below appears not to have avoided such confusion by its reference to, and reliance on, the *Schaller* case, *supra* (majority opinion, pp. 42a, 43a).

This court, in denying Schaller's petition for certiorari in that case, impliedly approved what was said below as follows:

> "The construction placed upon a statute by the courts becomes a part of the statute and hence a part of the law thereby enacted. Crawford, Statutory Construction, 184; Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604. In further support of this conclusion we need only point to Graves v. People of State of New York ex rel. O'Keefe, decided in 1939." 148 Pa. Super. Ct. 276, 280.

But no such doctrine of relation back may be invoked to justify an enlarged application of a prior municipal ordinance by means of a new federal statute. To do so, as attempted below, would amount to judicial approval of executive substitution of an Act of Congress for essential and subsequent municipal legislation, as a basis for authority to tax the petitioner and his class. Therefore, since the City Council, as is admitted, did not intend in adopting its wage tax ordinance in December of 1939 to tax nonresident employees in the Navy Yard, then if it later acquired the power to tax this class by virtue of Act 819, it would still have to determine the policy of enforcing such a tax.

Now it is not claimed or determined below (although logically it would have to be to support the judgment) that Act 819 extended the territorial bounds of the City of Philadelphia so as to embrace League Island. All that is found by the majority opinion is that the Federal Government gave the City *power* to tax those working in that Federal area adjoining the City "as though such area was not a Federal area" (statute cited in note, p. 27a). But there is nothing in the State constitution or in fundamental mu-

nicipal law *requiring* that the City exercise the rights thus assumed to have been given it. Adverse considerations would have first to be weighed, notably whether the cost of supplying municipal facilities to this new area would warrant the tax levy. This question alone would have called for new and deliberate action by the City Fathers, action which could not be supplied, by the doctrine of relation back, to the terms of an old ordinance that had not contemplated taxation in this area.

The majority opinion reveals some consciousness of this difficulty, but the solution there attempted is plainly erroneous (p. 42a). For it does not follow, as assumed in the opinion, that because the *O'Keefe Case* (*supra*) so modified the doctrine of *McCulloch v. Maryland* 4 Wheat. (17 U. S.) 316, as to permit state taxation of federal salaries by virtue of a statute antedating the O'Keefe decision, therefore no new ordinance was needed in the instant case. This assumption fails, as said, to distinguish between the effect of judicial correction of judicially declared law and the effect of a new statute. Though the accepted presumption is that the unwritten law has always been what the courts have last declared it to be, a new statute altering previous legislation is effective only from its enactment. Thus a validating act cannot invest an earlier act with a power omitted from such earlier act. *Beaty v. Inlet Beach* (Fla. 1942), 9 So. (2d) 735, 741.

A fortiori should this be asserted when it is held, as in the decision below, that a federal statute may operate retroactively, and by implication only, to extend the scope of a prior state statute or a prior city ordinance. Congress could never have contemplated that Act 819 would have such an unheard of effect.

CONCLUSION.

The City's right to tax petitioner must depend upon jurisdiction over either his person or his property or his place of employment, and only by benefiting him in one or more of these capacities may the City justify its right to tax him. *Shaffer v. Carter,* 252 U. S. 37. None of these bases of jurisdiction is found in the case at bar. The City's attempt to enforce its ordinance against those who are not subject to it is, therefore, an attempted taking of property "without due process of law" and violative of individual rights under the Fourteenth Amendment. *Henderson Bridge Co. v. Henderson City,* 173 U. S. 592; *Union Transit Co. v. Kentucky,* 199 U. S. 194, 202, *Dane v. Jackson,* 256 U. S. 589.

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